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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

## No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

*Petitioner,*

v.

FRANCES B. DAVIS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, AND VIRGINIA, AND THE STATES OF ALASKA, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OREGON, SOUTH CAROLINA, TENNESSEE, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI**

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington D.C. 20036
Attorney for the American
Council on Education

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

GERALD GORNISH
Attorney General of Pennsylvania
Capitol Annex, Room 1
Harrisburg, Pennsylvania 17120
Attorney for the
Commonwealth of Pennsylvania

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

*(Counsel continued inside front cover)*

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AVRUM GROSS
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for the
State of Alaska

JOHN A. LaSOTA, JR.
Attorney General of Arizona
200 State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

RICHARD R. WIER, JR.
Attorney General of Delaware
Wilmington Tower Bldg.—4th Floor
Wilmington, Delaware 19801
Attorney for the
State of Delaware

ROBERT L. SHEVIN
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304
Attorney for the
State of Florida

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for the
State of Georgia

RONALD Y. AMEMIYA
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813
Attorney for the
State of Hawaii

WAYNE L. KIDWELL
Attorney General of Idaho
State Capitol
Boise, Idaho 83720
Attorney for the
State of Idaho

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
State Capitol, P.O. Box 44005
Baton Rouge, Louisiana 70804
Attorney for the
State of Louisiana

FRANCIS B. BURCH
Attorney General of Maryland
1400 One South Calvert Building
Baltimore, Maryland 21202
Attorney for the
State of Maryland

A. F. SUMMER
Attorney General of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39205
Attorney for the
State of Mississippi

JOHN D. ASHCROFT
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for the
State of Missouri

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59601
Attorney for the
State of Montana

PAUL L. DOUGLAS
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
Attorney for the
State of Nebraska

THOMAS D. RATH
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
Attorney for the
State of New Hampshire

JOHN J. DEGNAN
Attorney General of New Jersey
State House Annex, Second Floor
Trenton, New Jersey 08625
Attorney for the
State of New Jersey

*(Counsel continued inside back cover)*

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## INTERESTS OF THE AMICI CURIAE

The interests of the amici curiae and their reasons for urging this Court to review the decision of the United States Court of Appeals for the Fourth Circuit in *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), are as follows:

The amici are a majority of the States and the American Council on Education, the nation's largest association of colleges and universities.[1] All of the amici fully support equal rights for handicapped individuals, as well as the purpose of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Nevertheless, because the amici have an obligation to comply with the Act and to bear, without any federal assistance, the enormous financial and other burdens associated with its administration, they have an important stake in its reasoned interpretation.[2]

The amici are concerned that a one-sentence prohibition with no particular legislative history is being transformed by administrative excess and judicial inventiveness into a tool of oppression not contemplated by Congress. For example, the Department of Health, Education, and Welfare ("HEW") in regulations

[1] The American Council on Education, a nonprofit corporation organized under the laws of and located in the District of Columbia, is a membership organization composed of 1,291 nonprofit institutions of higher education and 169 national and regional educational associations and organizations. One of the major functions of the American Council on Education is to speak for colleges and universities on matters of national significance. Because its members include the overwhelming majority of nonprofit institutions of higher education, the American Council on Education believes itself uniquely positioned to represent the interests of the higher education community on matters of national importance such as the issues presented to this Court in the pending petition. Written consent of the parties has been granted for participation by the American Council on Education in this brief.

[2] In a cost survey prepared for HEW, the estimated *annual* pecuniary cost of compliance with the Act has been set at 3.2 *billion* dollars. D. O'Neill, *Discrimination Against Handicapped Persons — The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance* at 65 (May 4, 1977) (unpublished report prepared for the HEW Office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77).



implementing the basic prohibition of section 504[3] has excised key statutory language[4] and has imposed affirmative action requirements on entities receiving federal funds where Congress with apparent deliberation placed none.[5] More importantly, the court of appeals in the present case has gone far beyond the HEW regulations in fashioning a definition of an "otherwise qualified" handicapped individual which is at war with common sense, the intent of Congress, and the regulations themselves. In addition, a majority of that deeply-divided court[6] refused to require the plaintiff to follow the administrative route specified in the HEW regulations, without analysis implied a private right of action under section 504, and without legal foundation held that the statute required a public college to modify its courses and programs to compensate for the disability of a single student.

The amici submit that this overextension, manipulation, and misapplication of section 504 reflects a lack of "sensitivity to the legitimate interests of both State and

[3] Section 504 provides that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[4] The word "solely" was eliminated in the HEW regulations. 45 C.F.R. § 84.4(a) (1977).

[5] Although Congress imposed affirmative action obligations on certain federal contractors in section 503 of the Act, 29 U.S.C. § 793, section 504 is silent.

[6] Upon submission of a petition for rehearing and suggestion for rehearing en banc to the six members then in regular active service on the court, Judges Russell and Widener dissented from the denial of rehearing en banc and indicated they would affirm the judgment of the district court; in addition, Chief Judge Haynsworth dissented from the denial of the petition for rehearing. 574 F.2d at 1163 (4th Cir. 1978).

National Governments," (*Younger v. Harris*, 401 U.S. 37, 44 (1971)), and impairs the States' "ability to function effectively within . . . [the] . . . Federal system." *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). In addition, this view of section 504 gravely endangers sound academic principles and undermines academic freedom, causing concern to all institutions of higher education, both public and private. For these reasons review of the Fourth Circuit decision is essential.

## QUESTIONS PRESENTED

I. Whether section 504 of the Rehabilitation Act of 1973 must be construed to require an institution of higher education receiving federal funds to admit a handicapped person whose handicap makes it impossible to participate effectively in the educational program and the career to which it leads?

II. Whether section 504 requires an institution to change its academic requirements or take other action to compensate for the disability of a handicapped applicant for admission?

III. Whether section 504 impliedly creates a private right of action that may be enforced by an individual without resort to federal administrative remedies?

## REASONS FOR GRANTING THE WRIT

### REVIEW IS NECESSARY TO SETTLE IMPORTANT QUESTIONS OF FEDERAL LAW BECAUSE THE COURT OF APPEALS HAS OVEREXTENDED AND MISAPPLIED SECTION 504 CONTRARY TO THE INTENT EXPRESSED BY CONGRESS AND BY HEW IN ITS IMPLEMENTING REGULATIONS.

In section 504 of the Rehabilitation Act of 1973, Congress established a mechanism to prevent discrimination against handicapped persons by grant recipients in their utilization of federal financial assistance.



Although a significant step in fostering equal opportunity for the handicapped, section 504 is a terse and carefully worded statute. Unlike the basic prohibitions of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), section 504 is framed in less absolute terms. A handicapped person may not be denied benefits "solely" by reason of his or her handicap and such an individual must be "otherwise qualified" to come within the protections of the statute.

Focusing on this language, the district court correctly construed section 504 to mean that "no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976). Thus, an applicant for admission to a college receiving federal aid must be able to function sufficiently in courses *in spite of* his or her handicap. *Id.*

A panel of the court of appeals, although conceding the reasonableness of this construction, 574 F.2d at 1160, held applicable the definition contained in subsequently promulgated HEW regulations implementing the Act *which it said* differed markedly from the district court's. The panel concluded that under the Act and the HEW regulations, a person must be admitted to a federally funded program *without regard to* his or her disability. 574 F.2d at 1160.

It is true, as noted in the panel opinion, that in deciding if a person is "otherwise qualified," the focus should be upon the issue of whether a handicapped individual can meet the academic and technical qualifications of a program. *Id.* at 1161. Nevertheless, this focus of inquiry, contrary to the panel's holding, must logically take into consideration the *nature* of a

person's handicap to see if he or she is qualified for admission into a particular program of study *in spite of* that handicap.

Indeed, this is the unequivocal position expressed in the HEW regulations. For example, in its official explanation of the meaning of "qualified handicapped person" in the regulations, that agency states:

> "Qualified handicapped person." Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word, "otherwise," is necessary in order to comport with the intent of the statute because, *read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap.* Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

45 C.F.R. § 84 app. A, at 376 (1977).

Adherence to the "without regard to" language of the court of appeals rather than the district court's "in spite of" language would create, quite literally, the spectre of blind bus drivers adverted to in the HEW analysis of its own regulations. Sound logic and common sense support the district court and HEW on this important question of federal law.

As detrimental to public and private beneficiaries of federal funds as the lower court's construction of the words "otherwise qualified" in section 504 is its determination to the effect that the statute imposes an affirmative action requirement. To contend that affirmative action is mandated or authorized under section 504 of the Act is to ignore the statutory language which on its face states that it is a statute mandating only that there be no "discrimination."



Nowhere in the short forty-eight words of section 504 is there an expression relating to affirmative action or preferential treatment — it provides only for equal access. This is of course unlike its counterpart, section 503 of the Act, 29 U.S.C. § 793, which requires federal contracts of more than $2,500 to contain a provision obligating the contractor to "take affirmative action to employ and advance in employment qualified handicapped individuals." *See* Note, *Rehabilitating the Rehabilitation Act of 1973,* 58 Boston Univ. L. Rev. 247, 270 (1978) ("[A]lthough section 503 imposes an affirmative action duty upon employers, section 504 imposes only a negative duty not to discriminate. Therefore, the classification of federal funds as a section 503 contract or a section 504 financial assistance will determine the nature and extent of the legal obligations owed by an employer . . . .").

Nevertheless, equal access does not require public or private institutions of higher education to open their doors to unqualified students. Only a policy of preferential treatment for past discrimination would suggest such a standard, and section 504 was not intended to redress the wrongs of the past or alleviate past discrimination. *Cf. United Air Lines v. Evans,* 431 U.S. 553, 558 (1977). Its sole purpose was to effectuate nondiscrimination in the utilization of federal financial assistance.

Nor does the lower court position on affirmative action derive any support from the HEW regulations implementing section 504. The statute contains no directive or authority for issuance of regulations and perhaps the only authority for any regulations is

Executive Order 11, 914, 41 Fed. Reg. 17,871 (Apr. 28, 1976), which merely allows HEW to "establish standards for determining who are handicapped individuals and *guidelines for determining what are discriminatory practices* within the meaning of §504" (emphasis added).[7] Because the affirmative action provisions of the new HEW regulations have no origin in the Act or the Executive Order, they are of dubious validity and of no help in justifying the imposition of an affirmative action requirement. *See United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976); Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 Mercer L. Rev. 745, 757 (1978).

Moreover, the imposition of an affirmative action requirement in section 504 whether by the court of appeals or HEW locks States and particularly educational institutions into a financial dilemma. As the court in *Barnes v. Converse College*, 436 F. Supp. 635, 638-39 (D.S.C. 1977), observed:

> Converse College is subject to regulation under 29 U.S.C. §794 because it receives federal financial assistance. None of this federal financial assistance, however, was given to Converse College for the purpose of providing auxiliary aids for the handicapped. No educational administrator needs to be reminded of the said [sic] fact that federal money means pervasive, bureaucratic federal control; and for pervasive, tyrannical bureaucratic federal control, the Department of Health, Education and Welfare knows no equal or superior . . . . This is not to say that this court is not entirely sympathetic with the spirit of federal legislation which encourages the expansion of opportunities for the handicapped. This is merely to say that if the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e., our taxes) for such purposes . . . .

In addition, if State beneficiaries or other entities receiving federal funds are required to expend funds on a handicapped person's behalf in order to make up for his or her disability, serious questions are raised with respect to the equal protection rights of non-disabled fellow applicants. *Cf. McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (allowing whites a cause of action under title VII and 42 U.S.C. §1981 for reverse discrimination); *Castaneda v. Partida*, 430 U.S. 482 (1977) (presumption that governing majority would not discriminate against itself insufficient basis for rejecting equal protection claim).

The lower court decision on affirmative action will also adversely impact on the autonomy and discretion of educational institutions that are so essential to maintaining academic freedom.[8] As Mr. Justice Powell noted only last term in *Regents of the University of California v. Bakke*, 98 S. Ct. 2733, 2760 (1978), "[t]he

[7] The HEW regulations stem in part from a district court order holding that section 504 impliedly required the agency to issue regulations. Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976). *But see* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947), where this Court said:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied to the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.

[8] Mr. Justice Frankfurter summarized the "four essential freedoms" that comprise academic freedom:

> . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

freedom of a university to make its own judgments as to education includes the selection of its student body." However, a glaring result of the lower court's opinion is the surrender of portions of this freedom without reason or authority. While the amici are not opposed to reasonable affirmative action obligations expressly imposed by Congress, educational officials must not be forced by shortsighted judicial or administrative fiat to give up control over course content, methods of instruction, and considered policies of admission. Accordingly, review by this Court of the decision of the court of appeals is necessary to prevent a serious and unwarranted dilution of academic freedom.

This case raises additional federal questions of nationwide importance that require prompt resolution, specifically, whether section 504 impliedly creates a private right of action and, if so, whether an individual must exhaust his or her administrative remedies available under the Act and the HEW regulations. Unlike any prior case of this Court, never has so much been implied in a statute from so little. Section 504 and the implementing regulations do not expressly authorize a private right of action. The legislative history is silent. The statute envisions and the regulations provide an elaborate administrative mechanism which can ensure remedial relief for individuals. And the threat of a cutoff of federal assistance guarantees swift enforcement of the statutory prohibition.

Only one court of appeals has devoted any analysis to the implication of a private right of action under section 504.[9] And the rationale of that case cuts against the judicial creation of such a private right. In *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th

[9] Other circuits finding such a right have done so only in conclusionary terms. *See, e.g.*, United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977), and Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).



Cir. 1977), the court implied a private right of action under section 504 for a large group of plaintiffs because at that time administrative remedial machinery did not exist to vindicate affirmative rights:

> We *expressly* leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . *But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review.*

548 F.2d at 1286 n.29 (emphasis added).

Since the promulgation of the HEW regulations, a meaningful administrative enforcement mechanism has existed for private parties, obviating the need for invention of a private right of action from a silent legislative history. Even if a private right of action should be found, because of the existence of the HEW regulations and the remedy they afford, the time is now ripe for this Court to apply to section 504 the well-established rule that a litigant is not entitled to judicial relief until the prescribed administrative remedy has been exhausted. *McKart v. United States*, 395 U.S. 185 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Recognizing the importance of this principle, a recent decision has held that a plaintiff may not bring a private action under section 504 of the Act without first exhausting the new HEW administrative remedies that were designed to investigate complaints of discrim-

ination. *Doe v. New York University*, 442 F. Supp. 522, 523-24 (S.D.N.Y. 1978):

> On paper, it now appears that, in the words of the Seventh Circuit in *Lloyd, supra*, "meaningful administrative enforcement" is available for complaints under section 504. HEW must be given at least the opportunity to develop an efficient and sensitive mechanism to deal with complaints of discrimination brought by handicapped persons before a court can make a reasoned evaluation of such a mechanism's adequacy. Especially in the context of a relatively new and broadly-worded statute like the one in question here, which could flood the courts with new litigation, administrative interpretation and guidance may be an important element in the developing construction and application of the law. . . . Further, it is not unreasonable to conclude that HEW could bring a greater degree of flexibility and expertise to bear on these issues.

Another decision, *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977), has also held that the "primary jurisdiction" doctrine is appropriate for grievances under section 504 of the Act. In *Crawford*, the plaintiff was a deaf-handicapped graduate student who claimed the university failed to provide him with interpreter services. The court in *Crawford* concluded that under the HEW regulations:

> [A]ny person believing himself to be the object of discrimination can file a complaint (45 C.F.R. § 80.7). An investigation can be commenced and a hearing may be obtained. While a complainant may not be a party to the proceeding, he can petition to become involved in the controversy as amicus curiae. (45 C.F.R. § 81.23).



440 F. Supp. at 1058. *See Barnes v. Converse College*, No. 77-1116 (D.S.C., order filed Mar. 28, 1978), *appeal docketed*, No. 78-1440 (4th Cir. July 19, 1978).

This authority may presage the required result in this case, whether resort is made to the doctrines of exhaustion of administrative remedies or primary jurisdiction. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976); *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 3142 (1978).

## CONCLUSION

The amici curiae are in full agreement with the remarks of one sage commentator who recently stated:

> No one can quarrel with a goal of full access and participation by handicapped citizens in the life and affairs of this nation, but questions are legitimately raised as to who can and should bear the costs inherent in serving that goal.

Brooks, *Section 504 of the Rehabilitation Act of 1973 and the Private College: Barnes v. Converse College*, 29 Mercer L. Rev. 745, 745-46 (1978).

At a time when all beneficiaries of federal aid, including the amici, are vitally in need of guidance regarding their necessary responsibilities under the Rehabilitation Act, this case raises these key questions and a host of others on the scope and meaning of this important federal statute. This Court's determination of those urgent questions of federal law is worthy of the most serious consideration. For these reasons and those expressed throughout this brief, the undersigned amici curiae strongly urge review by this Court of the divided decision of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

SHELDON ELLIOT STEINBACH
1 DuPont Circle, N.W.
Suite 824
Washington D.C. 20036
Attorney for the American
Council on Education

FRANCIS X. BELLOTTI
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108
Attorney for the
Commonwealth of Massachusetts

GERALD GORNISH
Attorney General of Pennsylvania
Capitol Annex, Room 1
Harrisburg, Pennsylvania 17120
Attorney for the
Commonwealth of Pennsylvania

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court — Library Building
Richmond, Virginia 23219
Attorney for the
Commonwealth of Virginia

AVRUM GROSS
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for the
State of Alaska

JOHN A. LaSOTA, JR.
Attorney General of Arizona
200 State Capitol Building
Phoenix, Arizona 85007
Attorney for the
State of Arizona

CARL R. AJELLO
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for the
State of Connecticut

RICHARD R. WIER, JR.
Attorney General of Delaware
Wilmington Tower Bldg.—4th Floor
Wilmington, Delaware 19801
Attorney for the
State of Delaware

ROBERT L. SHEVIN
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304
Attorney for the
State of Florida

ARTHUR K. BOLTON
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
Attorney for the
State of Georgia

RONALD Y. AMEMIYA
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813
Attorney for the
State of Hawaii

WAYNE L. KIDWELL
Attorney General of Idaho
State Capitol
Boise, Idaho 83720
Attorney for the
State of Idaho

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
State Capitol, P.O. Box 44005
Baton Rouge, Louisiana 70804
Attorney for the
State of Louisiana

FRANCIS B. BURCH
Attorney General of Maryland
1400 One South Calvert Building
Baltimore, Maryland 21202
Attorney for the
State of Maryland

A. F. SUMMER
Attorney General of Mississippi
Carroll Gartin Justice Building
Jackson, Mississippi 39205
Attorney for the
State of Mississippi

JOHN D. ASHCROFT
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
Attorney for the
State of Missouri

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59601
Attorney for the
State of Montana

PAUL L. DOUGLAS
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
Attorney for the
State of Nebraska



THOMAS D. RATH
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
Attorney for the
State of New Hampshire

JOHN J. DEGNAN
Attorney General of New Jersey
State House Annex, Second Floor
Trenton, New Jersey 08625
Attorney for the
State of New Jersey

LOUIS J. LEFKOWITZ
Attorney General of New York
#2 World Trade Center
New York, New York 10047
Attorney for the
State of New York

RUFUS L. EDMISTEN
Attorney General of North Carolina
Justice Building, P.O. Box 629
Raleigh, North Carolina 27602
Attorney for the
State of North Carolina

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower, 30 E. Broad St.
Columbus, Ohio 43215
Attorney for the
State of Ohio

JAMES A. REDDEN
Attorney General of Oregon
100 State Office Building
Salem, Oregon 97310
Attorney for the
State of Oregon

DANIEL R. McLEOD
Attorney General of South Carolina
Hampton Office Building
Columbia, South Carolina 29211
Attorney for the
State of South Carolina

WILLIAM M. LEECH, JR.
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
Attorney for the
State of Tennessee

SLADE GORTON
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504
Attorney for the
State of Washington

CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305
Attorney for the
State of West Virginia